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IN THE

# Supreme Court of the United States

OCTOBER TERM 1968

## No. 1256

EDDIE LEE HILL,

Petitioner,

versus

FLOTA MERCANTE GRANCOLUMBIANA, S.A.,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled cases on January 14, 1969.

## CITATIONS TO OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Louisiana is reported at 267 F. Supp. 380 and is reproduced, *infra,* as Appendix A. The opinion of the United States Court of Appeal for the Fifth Circuit is reported at ____ F.2d ____ and is reproduced. *infra,* as Appendix B.

## JURISDICTION

The Judgment of the Court of Appeals is dated January 14, 1969 and was entered January 14, 1969. There was no application for rehearing filed. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

## QUESTION PRESENTED

Whether hatch openings which are seaworthy from a structural point of view remain seaworthy at the moment of use when they are in fact not large enough to accommodate the men who will use them.

## REGULATIONS INVOLVED

"(a) There shall be at least one safe and accessible ladder for each gang working in a hatch. However, no more than two such ladders are required in any hatch. An adequate means of gaining a handhold shall be provided at or near the head of each vertical fixed ladder in cases where any coaming or other structural features are such that they cannot serve this purpose.

"(b) When any fixed ladder is visibly unsafe the employer shall prohibit its use by employees.

"Straight ladders of adequate strength and suitably secured against shifting or slipping shall be provided as necessary when fixed

hold ladders do not meet the requirements of paragraph (a) of this section, except that when conditions are such that a straight ladder cannot be used, Jacobs ladders meeting the requirements of § 1504.22 may be used." 29 Code of Federal Regulations § 1504.25 (a) (b) (c).

## STATEMENT OF THE CASE

This suit commenced as a libel by Eddie Lee Hill in admiralty under the General Maritime Law in the United States District Court for the Eastern District of Louisiana. The libel sought damages against respondent *Flota Mercante Grancolumbiana, S. A.* for personal injuries received aboard that vessel while libelant was employed by New Orleans Stevedoring Company as a longshoreman. Respondent appeared and answered the libel and thereafter filed a third party complaint against New Orleans Stevedoring Company seeking indemnity if cast and costs of defense and attorney's fees in any event. Travelers Insurance Company intervened seeking recovery of benefits paid under the Longshoremen's and Harbor Workers' Compensation Act.

The case was tried to the Court without the intervention of a jury and judgment was rendered dismissing the libel and the intervention for compensation. Judgment was likewise entered granting respondent recovery over against third party defendant.

Libelant noticed an appeal to the United States Court of Appeals for the Fifth Circuit. No other party appealed. The sole issue before the Court of Appeal was

the right of libelant to recover in the first instance.

The Court of Appeal affirmed, *per curiam.*

## REASONS FOR GRANTING THE WRIT

(1) There are ten thousand men at the Port of New Orleans who earn their daily bread as Longshoremen. They are for the most part strong and hardworking men who gladly wrest a living for themselves and their families from the dangerous and laborious occupation to which they give their lives. Around this nation there are untold thousands more men such as these. These men are not generally suited by training or background for safer, more sedentary, occupations. Indeed the nation is fortunate to have these men to do the necessary labor to move its goods and products.

Their work is by nature dangerous. They must work with great weights, around and near moving drafts of cargo, they must climb and descend precipitous ladders to reach their appointed working place. It ill behooves anyone to make the job of this multitude of men more dangerous than it need be. And yet that is the effect of the decision by the lower courts in this case.

It had been thought that the test of seaworthiness was to be applied when and where the work was to be done.[1] Not so in this case. There has been engrafted

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[1] In *Manich vs. Southern S. S. Co.*, 321 U. S. 96, however, the Court made it clear that the availability of safe and sufficient gear on board does not prevent the actual use of defective gear

an exception to this general rule. In our case the complainant was injured when he went through a hatch slightly larger[2] than, the minimum size called for by good ship building practice. He had difficulty with the hatch and was injured. The District Court made only brief reference to the argument that there was a duty to provide a safe and accessible ladder to the men who were going to use the ladder. The Court, while treating complainant's claim rather facetiously, commented that the opening was larger than standard size, R. 91, and concluded "at least when the hatch openings are bigger than the standard size, they don't render a vessel unseaworthy even for a stout longshoremen." R 91-92. To the argument that the regulations of the Bureau of Labor Standards require a safe and accessible ladder for the men who will use it the Court merely says "but the ladder provided here was safe and accessible." This factual conclusion follows from the basic error of law previously illustrated. A larger than standard size hatch opening does not render a vessel immune from an unseaworthiness attack

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from constituting unseaworthiness, for the test of seaworthiness is to be applied 'when and where the work is to be done.' Id., at 104. And in *Crumady v. The J. H. Fisser*, 358 U. S. 423, we further clarified the extent of unseaworthiness liability by holding that, even though the equipment furnished for the particular task is itself safe and sufficient, its misuse by the crew renders the vessel unseaworthy. We emphatically stated the basis of our holding: "Unseaworthiness extends not only to the vessel but to the crew." *Waldron vs. Moore-MacCormack Lines*, 386 U. S. 724 (1967).

[2]The normal size is 15 by 23 inches. These hatches are oval in shape which cuts down their area. The hatch in question was oval shaped, 17 by 25 inches and had a beam obstructing the way somewhat below deck level. Tr. I pgs. 8, 10, 27, testimony of LeCourt, the naval architect.

when in fact the hatch is too small for the men who will use it.

The trial court did not apply the test when and where the men were using the hatch. The trial court looked at the hatch in the abstract. On this record the application of the proper test would have made a different result.

There were ten men who had to go through this hatch. Tr. II, 54. The trial court noted (R. 93) that libelant and two others testified that they had trouble getting through this hatch. That would be the testimony of libelant, Eddie Thurman[3] and Otis Strickland. Tr. II 14-21, 45-50. There were two others who did not testify who, by stipulation, would testify as Strickland testified. See Tr. II, 50-53. At least five of the ten men were too large for this hatch. The testimony of another, LaGarde, could also be read to make him too large.

In any event half the men were too big for the hatch. In such an event an alternate means of ingress should have been provided, 29 C.F.R. 1504.25. Failure to have adequate ingress rendered the vessel unseaworthy.

## CONCLUSION

Structural seaworthiness of a vessel does not render it seaworthy when and where its components are being used unless it is in fact safe and seaworthy at that

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[3]Thurman had skinned up his knee shortly before trial on a similar ladder. Tr. II, 20-21.

time and place. When half the men cannot use a hatch safely it is not adequate. For the reasons assigned the Petition for Certiorari should be granted.

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**CERTIFICATE**

I hereby certify that a copy of this petition has been served upon John R. Peters, Esq. and Maurie D. Yager, Esq., opposing counsel of record, by depositing same in the United States Mail, postage prepaid to their respective office addresses.

Clifton S. Carl

## APPENDIX "A"

RUBIN, District Judge.

Eddie Lee Hill, a longshoremen who stands 5 feet 11 inches tall, and weighs 250 pounds, hurt his knee while descending a ladder through a hatch opening. There was nothing wrong with the ladder. The opening was larger than the standard size. Nonetheless, Hill says the vessel was unseaworthy, and his lawyer puts his case with commendable candor: The hatch itself was not too small. But, he contends, Hill was too large to use the hatch safely. Hiring longshoremen too big for the available hatch renders a vessel unseaworthy, he says. Albeit ingenious, that's a thin argument but, even so, there's no opening in the jurisprudence wide enough to squeeze it through. At least when the hatch openings are bigger than the standard size, they don't render a vessel unseaworthy even for stout longshoremen.

The factual background may be sketched briefly. The Republica del Equador is a C1-M-AV1 type vessel. It arrived in New Orleans in the early afternoon of June 5, 1963, and cargo operations began shortly after docking. The next day Hill was descending the fixed ship's ladder from the weather deck into one of the 'tween decks. His foot slipped and he bumped his right knee. The ladder was in good condition, and there was no oil, grease, or other foreign substance on it. Hill and his fellow longshoremen had used ladders of identical construction on similar type vessels on a number of occasions before the accident, and had never complained about the ladder or asked for alternate means to enter the

cargo spaces. Both Hill and the shipowner called witnesses expert in the field of naval architecture, and the witnesses on both sides testified that oval hatches having dimensions of 15 inches by 23 inches are standard, and widely used. The dimensions of the hatch in question were 17 inches by 25 inches. After his injury, Hill was off work for 25 weeks, and he was paid $70 a week in compensation, together with $945.55 in medical expense under the Longshoremen's and Harbor Workers' Compensation Act.[1]

Hill sued the shipowner on the basis that "the owner failed to provide [Hill] with a safe place to work; failed to provide safe ingress and egress to the cargo area; failed to provide proper safety devices; failed to provide adequate supervision of activities and working conditions."

The shipowner filed a third-party complaint against the stevedore.

It is of course true that it is the obligation of the shipowner to provide at least one safe and accessible ladder for each gang working in a hatch,[2] but the ladder provided here was safe and accessible. There were ten hold men working the hatch in question. Six of them were men of substantial girth, although none was larger than Hill. Hill and two of the other longshoremen testified that they had some difficulty getting into a hatch such as the one involved here. Nonetheless,

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[1]33 U.S.C.A. §901 et seq.

[2]Safety and Health Regulations for Longshoring, 29 C.F.R. §1504.25 (a).

all of them had used this hatch opening, or like hatch openings on similar vessels, without trouble, and they all continued to use the same hatch opening and the same ladder without problems after Hill was hurt.

A big, heavy man must obviously use more care in descending a ladder than a small agile man. A basketball player 6 feet 11 inches tall must lower his head when going through doorways. This does not mean that every hatch must be provided with alternate ladders, or every door made as tall as a steeple. The hatch opening was big enough and safe enough to make the vessel seaworthy. It is hornbook law that the owner of the vessel is not required to provide an accident free ship, but only one reasonably fit for its intended use. "The standard is not perfection."[3]

But counsel urges that Hill was his own unseaworthy condition. He was himself unfit for the operation at hand unless a Jacob's ladder or some other means of descending into the hatch was provided. But its' a far stretch (and worse than a tight squeeze) to reach this result reasoning by anology, from the rule that a ship is unseaworthy if it puts to sea with an incompetent master or an untrained or fever-ridden crew.[4] There is no justification to extend Judge Hand's famous standard for measuring the seaworthiness of personnel

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[3]Mitchell v. Trawler Racer Inc., 1960, 362 U.S. 539, 80 S.Ct. 926, 4 L.Ed.2d 941; Boudoin v. Lykes Bros. SS Co., 1955, 348 U.S. 336, 75 S.Ct. 382, 99 L.Ed. 354; and Gutierrez v. Waterman Steamship Corp., 1963, 373 U.S. 206, 83 S.Ct. 1185, 10 L.Ed.2d 297.

[4]Keen v. Overseas Tankship Corp., 2 Cir., 1952, 194 F.2d 515, cert. denied 343 U.S. 966, 72 S.Ct. 1061, 96 L.Ed. 1363, 1952. See also Gilmore & Black, The Law of Admiralty, 329.

by requiring the owner to warrant that the seaman is not only equal in disposition and seamanship, but no larger in girth, than ordinary men in the calling.[5] But this is indeed plaintiff's contention because he asserts that the longshore gang was "improper" for this ship because its men were too big for the hatch.

In *Holmes v. Mississippi Shipping Co.*, 5 Cir., 1962, 301 F.2d 474, the Fifth Circuit Court of Appeals held that a seaman is not entitled to recover damages for injuries caused by unseaworthiness of his former vessel if the seaman himself constituted the unseaworthiness. In discussing the case of the mentally disturbed seaman who sought to recover from the shipowner when he cut off his own hand, the court stated that recovery cannot be had by a seaman injured solely by his own negligent, or his own irresponsible, act.[6]

The plaintiff relies upon *Admiral Towing Company v. Woolen*, 9 Cir., 1961, 290 F.2d 641, which involved the disappearance of a tug at sea. The owner had employed an agent to bring the tug from San Francisco to

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[5]The criterion stated by Justice Learned Hand has since become standard. He said: "Applied to a seaman, such a warranty [seaworthiness] is, not that a seaman is competent to meet all contingencies; but that he is equal in disposition and seamanship to the ordinary men in the calling." Keen v. Overseas Tankship Corp., 2 Cir., 1952, 194 F.2d 515, cert. denied 343 U.S. 966, 72 S.Ct. 1061, 96 L.Ed. 1363, 1952.

[6]A different view was taken in Holley v. The S.S. Manfred Stanfield, E.D. Va., 1960, 186 F.Supp. 212. The Fifth Circuit Court said that the true "and contrary" rule is set forth in Cavelleri v. Isthmian Lines, Inc., S.D. N.Y., 1961, 190 F.Supp. 801. Donovan v. Esso Shipping Co., 3 Cir., 1958, 259 F.2d 65 and Williams v. The S.S. Richard deLarrinage, 4 Cir., 1961, 287 F.2d 732.

Astoria, Oregon. The agent was to take on a crewman, but, without the owner's knowledge, he employed an inexperienced seventeen year old school boy for the job. The Court held that the trial court was justified in finding that the vessel was unseaworthy because the owner failed to supply an adequate and competent crew; and the owner was therefore liable for the boy's death. In a sense it can be said that the court found that the inexperienced hand was himself the unseaworthy condition. But that is not the true meaning of the decision. What the case holds is that a vessel equipped with an incompetent crew is unseaworthy. There is an inherent defect in the crew that violates the owner's warranty. It is interesting to note further, however, in connection with the *Admiral Towing* case that the law has always imposed a special obligation on those dealing with persons whom they know to be incompetent or inexperienced to exercise a greater degree of care towards them.[7] This is, in general, a rule of tort law, not of unseaworthiness, but the principle would appear to be applicable in determining whether the owner of a vessel had discharged his duty to provide a competent crew.

There is no occasion to apply the *Admiral Towing Company* decision here. Physically and mentally, Eddie Lee Hill was equipped for his job — indeed he urges

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[7]See Restatement, Torts, §290, Comment k. (2d Ed. 1965); Prosser, Law of Torts, §33, at 175 (3rd Ed. 1964); 38 Am. Jur. Negligence §36, at 683 (1941):

> "It is a principle of law, as well as of natural justice, that greater consideration and care are due to persons known to be unable to take care of themselves than to those who are fully able to do so."

that he was over-equipped. There was no defect in the vessel or its crew. He should not be permitted to recover for unseaworthiness.

## INDEMNITY.

The shipowner asserts that the stevedore owes it the cost of its defense including reasonable attorney's fees. The stevedore argues that the plaintiff's original claim did not indicate that the stevedore breached any duty to perform in a workmanlike manner, that a call for indemnity and demanded to defend must be appraised by the appearance of things before the case is tried, and that the stevedore did indeed perform its contract in a workmanlike manner.[8]

To justify its position, the stevedore seizes upon language in *Strachan Shipping Co. v. Koninklyke Nederlandsche, S.M.N.V.*, 5 Cir., 1963, 324 F.2d 746 that, "The plaintiff's suit was not completely without merit. It must be appraised to some extent at least by the appearance of things before the case was tried." But that language refers to the basis for imposing the costs of the owner's defense on the stevedore when the owner had to defend the longshoreman's suit because, even though it was without ultimate merit, it appeared from the complaint that liability might result. The language cannot be turned around to make it imply that the owner's right to indemnity must be determined on the face of the pleadings.

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[8]Ryan Stevedoring Co. v. Pan Atlantic SS Co., 1956, 350 U.S. 124, 76 S.Ct. 232, 100 L.Ed. 133.

In *Massa v. C.A. Venezuelan Navigacion*, 2 Cir., 1961, 332 F.2d 779, the stevedore was required to indemnify the owner for the cost of defense when a longshoreman was injured by cargo spilling on him from a pallet. The complaint against the shipowner based on unseaworthiness was dismissed; but the stevedore was nonetheless liable to the owner.[9] The court reasoned:

> ". . . There is no question that the stevedore breached its warranty to perform in a workmanlike manner, for the trial court found that the cause of the accident was the negligence of the stevedore's employees. This negligence rendered the shipowner liable to suit, and we see no good reason for forcing the shipowner to bear the expenses of successfully defending the suit when the stevedore would have to bear the shipowner's expense of unsuccessfully defending the suit."

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[9]Massa v. C.A. Venezuelan Navigacion, 2 Cir., 1964, 332 F.2d 779, cert. denied 379 U.S. 914, 85 S.Ct. 262, 13 L.Ed.2d 186. See in accord Guarracino v. Luckenbach Steamship Co., Inc., 2 Cir., 1964, 333 F.2d 646, cert. denied, 379 U.S. 946, 85 S.Ct. 439, 13 L.Ed.2d 543, in which the court said: "Recovery over may be had even if the shipowner is exonerated from fault or unseaworthiness. . . . Potential liability is sufficient. . . . This rule would apply even if the unsafe conduct was that of the injured longshoreman alone. . . . This is as it should be, for it is the stevedore, in direct control of the hatch boss and the worker, who can best avoid the injury and expense by insistence on observance of safety precautions." D/S Ove Shou v. Hebert, 5 Cert., 1966, 365 F.2d 341; United States Lines Company v. Williams, 5 Cir., 1966, 365 F.2d 332; Lusich v. Bloomfield Steamship Co., 5 Cir., 1966, 355 F.2d 770.

The stevedore's duty to perform its contract with the owner in a workmanlike manner, implied in law, requires the stevedore to indemnify the owner against all loss occasioned as a result of the stevedore's failure to perform its duties in a safe and workmanlike manner.[10]

Eddie Lee Hill's suit is groundless. But someone must bear the costs of its defense. Either the owner must bear its own expense, simply because it was sued, without sound reason, by the stevedore's employee, or the stevedore must make the owner whole. The cost arose directly from the stevedore's opera-

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[10]See to the contrary Arista Cia. DeVapores, S.A. v. Howard Terminal, N.D. Calif., 1965, 247 F.Supp. 710, in which the Court said: "Does it follow that the Stevedore, equally without fault, must reimburse the shipowner for damage done by its employee in the form of attorney's fees reasonably expended by the Shipowner in defending against a personal injury suit in which it is found that the injury was caused solely by the workman's own carelessness? This court holds that it does not. . . . In the case here presented, the damage to the Shipowner is done, not on the vessel, but in the process of litigation where the workman is acting as his own agent free of the Stevedore's control. Unlike the situation in Damanti v. A/S Inger, supra, (where there was evidence of unseaworthiness) and Guarracino v. Luckenbach, supra (where the supervisor had abandoned his post) the injured workman in this case came to court as a result of his own folly. Therefore, the Shipowner (like all other property owners) must accept the burden of defending himself against unmeritorious claims of workmen invited on his premises and cannot look to the Stevedore for reimbursement. If the court were to decide otherwise, undue pressure might be put on longshoremen by their employers to accept compensation rather than sue the Shipowner and run the risk of incurring legal defense fees which the Stevedore company or Contractor would ultimately have to pay. Such a result was not the aim of the Longshoremen's and Harbor Workers' Compensation Act."

tion, and the claim arose from its own employee, who was injured by his own negligence. His injury was not occasioned by the negligence of either the shipowner or the stevedore. At the time of trial his claim had narrowed to the contention that he was too big for the hatch opening. If anyone could have guarded at all against the claim, it was the stevedore who hired him. In addition the cost of this type of suit appears at the present to be an inevitable economic consequence of the stevedoring operation. The stevedore can best handle it as part of the economic burden of its operations passing it along as it does other costs. Finally, we should not disregard the ancient legal principle that urges that, when an expense must be borne by one of two innocent parties, it should be placed on the one whose act permitted the loss to occur. For these reasons, as between owner and stevedore, the loss should fall on the stevedore.[11]

For the reasons stated judgment will be entered dismissing the plaintiff's claim, but in favor of the defendant against the third-party defendant for indemnity. If the amount due as indemnity cannot be agreed upon by the parties, that issue will be tried separately. The Clerk will prepare and enter a judgment accordingly.

(Signed) ALVIN B. RUBIN
UNITED STATES
DISTRICT JUDGE

New Orleans, Louisiana
May 9th, 1967.

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[11] 2 Pomeroy, Equity Jurisprudence §363, at 9.

## APPENDIX "B"

PER CURIAM: We agree with the excellent opinion of the district court, appearing at 276 F. Supp. 380 (1968), holding that under the evidence in this admiralty case, brought by an injured longshoreman, the vessel was not proved to be unseaworthy and appellant was injured through his own negligence.

AFFIRMED.